IN THE HIGH COURT OF JUDICATURE AT BOMBAY

T and I J

Notice of Motion NO.79 of 2005

In

Misc.Petition NO.27 of 2005

In

Petition No.63 of 2005

Cyrus Behram Irani and Ors... Petitioners

V/s

Kavass Khurshed Nariman ... Respondent

Shri Roop M. Vasudeo for Petitioners

CORAM:S.R.SATHE,J.

DATED:22nd Dec. 2005

P.C.:-

1. Heard the learned Counsel for the Petitioners and Respondents.

2. Perused the papers.

3. Petitioners who are the trustees of the trust viz. Sir J.B.Boman Behram Charitable Trust have filed this Misc. petition under Section 263 of

Indian Succession Act to set aside, quash, revoke or cancel Letters of Administration De Bonis Non with Will and with codocile thereto annexed dated 3-3-2005 granted by this Hon'ble Court to the Respondent.

4. According to the Petitioners the Respondent without disclosing true facts and misleading the court obtained De Bonis Non from the Court. It is case of the Petitioners that some of the properties left by deceased Sir J.B.Boman Behram are in fact held by the trust viz. Sir J.B.Boman Behram Charitable Trust and the Petitioners are managing the said property. However, on the basis of the order dated 3-3-2005 the Respondent started inter meddling with the said properties. Hence the Petitioners filed the present petition and also took out Notice of Motion and prayed that during the pendency of this petition, the Court Receiver, High Court, Bombay be appointed in respect of the estates, properties and assets left by the said deceased now in trust viz.Sir J.B.Boman Behram Charitable Trust and also claimed certain other reliefs.

5. After hearing Counsel for both sides, on 7-5-2005 this court (Coram:S.U.Kamdar,J) directed both the parties to maintain complete status quo in respect of the estate of the deceased and the

Charity Commissioner was directed not to proceed further on any applications pending before him in respect of the said trust viz. Sir J.B.Boman Behram Charitable Trust.

6. Respondent filed affidavit in reply and opposed the Notice of Motion. It is the contention of the Respondent that the Petitioners have no interest in the grant issued in his favour and Letters of Administration De Bonis Non have been issued to him after complying with the requisitions issued by the office of this Court. According to him the alleged trust of which the Petitioners claimed to be trustees is a fraud and brought into existence by the Petitioner no.4 who claimed to be the original trustee along with Banoo F.K.Boman Behram. It is contended that the said Banoo F.K.Boman Behram was the wife of Mr.F.K.Boman Behram, one of the executors and upon his death though Banoo had no right, title or interest in the estate of deceased she created the said trust. In fact the tenants occupying building no.208, initially owned by the deceased filed application under Section 70A of Bombay Public Trust Act before the Charity Commissioner for revocation of the said trust. According to the Respondent he being the grand nephew of deceased, was entitled to have grant under Section 258 read with 219 of Indian succession Act. Respondents further contended that if the reliefs as

prayed in the Notice of Motion are granted the Respondent would suffer irreparable loss and the properties of deceased will be damaged. Hence on all these grounds the Respondent prayed for rejection of the Notice of Motion.

7. It is not in dispute that the properties in question were originally owned by Sir J.B.Boman Behram, who died on 29-12-1949. It is also admitted fact that the executors named in codicils of the deceased obtained probate of the said will and codicils from this Court on 14-8-2005 in Petition No.330 of 2005. Admittedly Banu F.K.Boman Behram was one of the executor of the said Will and after his death his wife Babu had filed a petition being Testamentary Petition No.410 of 1994 on 21-3-1994 for letters of administration De Bonis Non of Will but the same was dismissed for want of prosecution on 1-2-2001. In the meantime the said Banoo F.K.Boman Behram had also created a trust i.e. Sir J.B.Boman Behram Charitable Trust. However, thereafter the present Respondent filed petition for letters of administration bearing No.63 of 2005 in which after following due procedure grant of De Bonis Non was issued in the name of the present Respondents on 3-3-2005.

8. The learned Counsel for the Petitioners argued before me that though grant is issued in favour of

Respondent on 3-3-2005 the property in question viz. 1. Piece of lease hold land together with building standing thereon situate at the junction of mount Road and Love Lane in Mazgaon in the City and Registration, sub District of Bombay admeasuring about 1545 sq.yds. 2. Piece of land with bungalow, outhouse standing thereon situate in the village of Bhagoor in the District and Sub District of Nasik, admeasuring about 4087 sq.yards bearing Survey NO.350 and House no.71/1 of the Deolali Cantonment Board, is owned and possessed by the trust by name Sir J.B.Boman Behram Charitable Trust and the said trust is managing the said property. He, therefore, submitted that it is necessary to restrain the Respondents from dealing with the said property and appoint Receiver in respect of the said property. As against this the learned Counsel for the Respondent submitted that Banoo F.Boman Behram had in fact no right, title or interest in the said property and as such the creation of the alleged trust itself is illegal and trust has in fact no right, title or interest in the above mentioned property.

9. In order to find out as to who is in fact managing the property in question and in what manner, it was suggested that parties should file affidavit. Accordingly,the Petitioner no.1 Cyrus Behram Irani filed his affidavit and submitted that

above mentioned properties are being managed by the trust and they have paid taxes of the said properties which are to the tune of Rs.25 lacs. Though the Respondent has filed affidavit in reply and contended that averments in the affidavit of the Petitioner no.1 are not true and correct and Petitioner has not given necessary details and submitted the annual returns, balance sheet and minute books of the trust, it must be noted that Respondent no.1 has not specifically stated that above mentioned property is in his possession or that he is managing the said property in particular manner. On the contrary, in the affidavit he has stated "on obtaining possession of the estate, I will raise funds to clear all arrears and carry out obligations under the Will and codicils". This statement of Respondent no.1 clearly goes to show that he is not in actual possession of property mentioned above. So, prima facie, it is clear that the property is being managed by the Petitioner i.e. by trust.

10. We cannot ignore the fact that the trust in question has come into existence in the year 1998 and the property mentioned above is shown as property of the trust as per provisions of the Bombay Public Trust Act. Respondent had not joined Trust as party in his Petition No.63 of 2005. When such is the position it is absolutely necessary to

restrain the Respondent from dealing with above mentioned properties. At the same time as there is dispute over the above mentioned properties, it is necessary to protect and preserve the said property till Misc. Petition NO.27 of 2005 is decided on merits. Incidently it may be noted that some of the tenants in the above mentioned property have filed application under Section 70A of the Bombay Public Trust Act before the Charity Commissioner, Mumbai and the same is pending, it is not necessary to stay the said proceedings as the said proceedings are for cancellation of the trust. So the Charity Commissioner can decide the said application according to law and without being influenced by the observations in this order.

11. From perusal of the Notice of Motion it is clear that the Petitioners are claiming relief on the basis that the above mentioned 2 properties are held by the trust. Naturally, they are entitled to seek relief only in respect of 2 properties mentioned above and not in respect of rest of the properties of deceased Sir P.M.Boman Behramji. The learned Advocate for the Petitioners has submitted that he is not pressing the appointment of Receiver at this stage and respondent be restrained from dealing with above two properties on the basis of grant issued in his favour.

12. It was tried to be argued on behalf of the Petitioners that as it is case of the Petitioners that Letters of Administration have been obtained by the Respondent by suppressing material facts and by fraud, it is necessary to restrain the Respondent from dealing with the properties of the deceased. However, bear reading of the Misc. Petition shows that they are not having any right, title or interest in respect of other properties of the deceased. Naturally, they are not concerned with other properties and as such cannot raise any dispute about the same.

13. In this view of the matter the Respondent is hereby restrained from dealing with above mentioned two properties in any manner either independently or on the basis of Letters of Administration granted to him in Petition No. 410 of 1994 till the disposal of Misc. Petition NO.27 of 2005.

14. As prima facie the above mentioned two properties are shown as trust properties, the trustees i.e. Petitioners herein are bound to deal with the said properties in accordance with the provisions of Bombay Public Trust Act. Naturally, they are under an obligation to maintain proper accounts in respect of income and expenditure of the said properties and cannot dispose of the said property without following due procedure under

Bombay Public Trust Act. Even then the Petitioners are hereby directed to maintain proper accounts in respect of income and expenditure of the above mentioned two properties and shall not dispose of the said properties and create any third party interest or charge on the said property till the disposal of Misc. Petition.

15. The order passed on 7-7-2005 in this Notice of Motion is modified and Notice of Motion is disposed off in the above terms.

(S.R.SATHE,J.)